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No. 05-1272

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. and
BOEING NORTH AMERICAN, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA AND
UNITED STATES OF AMERICA ex rel. JAMES S. STONE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF COMSTOCK RESOURCES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF COMSTOCK RESOURCES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

Comstock Resources, Inc. is a Texas based oil and gas company that owns substantial mineral interests on the Indian Reservation of the Alabama and Coushatta Indian Tribes of Texas (the "Tribe"), and on federal leases in the Gulf of Mexico. Each month, Comstock reports and pays royalties

[1] This brief is filed with the consent of the parties, as indicated by letters filed with the Court. No party authored this brief in whole or in part and no one, other that *amicus curiae* and its counsel, monetarily contributed to the preparation or submission of this brief.

on mineral production from its Indian and federal leases to the United States Minerals Managements Service ("MMS").

Since 1998, Comstock has been defending a *qui tam* lawsuit filed by Relators Don Kennard and Harrold E. ("Gene") Wright under the reverse false claims provision of the False Claims Act ("FCA"), 31 U.S.C. §3729(a)(7). Relators allege that Comstock falsely reported and paid royalties owed to the Tribe and the United States. Comstock denies those allegations. Moreover, Comstock contends that Relators' claims are jurisdictionally barred because Relators cannot qualify as the "original source" of the allegations against Comstock under the plain language of the statute. *See* 31 U.S.C. §3730(e)(4)(B).

Relators' claims against Comstock are currently pending as a part of MDL-1293, *In re Natural Gas Royalties Qui Tam Litigation*, in the United States District Court for the District of Wyoming. The district court previously dismissed Relators' claim against Comstock for lack of subject matter jurisdiction under 31 U.S.C. §3730(e)(4). *See* 2002 WL 32714554 (D. Wyo. Nov. 6, 2002). But, the Tenth Circuit reversed that decision. *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1044-48 (10th Cir. 2004) ("*Kennard*"). In so doing, the Tenth Circuit employed an overly expansive reading of its prior decision in *United States ex rel. Stone v. Rockwell International*, 282 F.3d 787 (10th Cir. 2002) ("*Stone*"), to find that Relators satisfied the FCA's original source requirement for their claims against Comstock. *Kennard*, 363 F.3d at 1044.

Two terms ago, Comstock asked this Court to grant certiorari review of the Tenth Circuit's overly inclusive definition of what is required to be an original source under 31 U.S.C. §3730(e)(4)(B). *See* Case No. 04-165, *Comstock Resources, Inc. et al v. Don C. Kennard and Harrold E. Wright.* Now, in this amicus brief, Comstock supports an interpretation of the FCA's original source requirement that would require a

relator to possess actual, first-hand knowledge of the alleged fraud in order to qualify under the original source test's "direct and independent knowledge" standard. Comstock supports the interests of the Petitioners in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The False Claims Act is a fraud statute. *See* 31 U.S.C. §3729(a). Congress drafted the FCA's *qui tam* provisions to allow relators to file suit on behalf of the United States to disclose and prosecute frauds against the Government. 31 U.S.C. §3730. Congress wanted to encourage "individuals who are close observers or otherwise involved in fraudulent activity" to break the "conspiracy of silence" surrounding the fraud. S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269. At the same time, Congress also wanted to avoid parasitic lawsuits by individuals seeking to profit from information that had already been publicly disclosed. 31 U.S.C. §3730(e)(4). Congress achieved its goals through several provisions in the FCA, including the disclosure requirement of 31 U.S.C. §3730(b)(2), and the jurisdictional bar against suits based upon public disclosure except for those brought by an original source, 31 U.S.C. §3730(e)(4).

This Court should reject the Tenth Circuit's original source test stated in *Stone* and *Kennard* because it erroneously allows a relator to qualify as an original source without any actual knowledge of the alleged fraud. Under the FCA's general disclosure provision that applies even in the absence of a public disclosure, a relator who possesses no evidence or information regarding an alleged fraud cannot satisfy the prerequisites to filing suit on behalf of the United States. *See* 31 U.S.C. §3730(b)(2). Moreover, a relator who lacks actual, first-hand knowledge of a fraud does not have "direct and independent knowledge" of the fraud sufficient to qualify as an original source able to file suit after the allegations have

been publicly disclosed. *See* 31 U.S.C. §3730(e)(4). In contrast to the clear knowledge requirement that Congress intended, the Tenth Circuit in *Stone* and *Kennard* has adopted an approach that leads to an ad hoc determination of how much speculation, deduction, and conclusion may substitute for the "knowledge" required by the statute.

This Court should adopt an original source standard that is consistent with the FCA's text, one that requires a relator to possess actual, first-hand knowledge of the fraudulent conduct or transaction that forms the basis of the relator's allegations. When crafting that standard, this Court should expressly disapprove of the Tenth Circuit's reasoning in *Stone* and *Kennard*.

ARGUMENT

A. A Plain Reading of the FCA Requires a Relator to Possess Actual, First-Hand Knowledge of the Fraud to Qualify as an Original Source.

When interpreting the meaning of Section 3730(e)(4), the Court should consider that provision in the context of the statute as a whole. *See Dolan v. United States Postal Service*, 126 S.Ct. 1252, 1257 (2006). The starting point to analyze whether a relator is qualified to pursue a *qui tam* action must begin with Section 3730(b)(2), which establishes the base requirements for a relator to be able to sue on behalf of the United States. The Tenth Circuit's reasoning in *Stone* and *Kennard* fails to recognize the impact of Sections 3730(b)(2). A party who has no knowledge of a fraud cannot file suit as a relator under Section 3730(b)(2), much less qualify as an original source under Section 3730(e)(4)(B).

1. *FCA Section 3730(b)(2) Requires a Relator to Possess and Disclose Evidence and Information to Support the Allegations of Fraud.*

FCA §3730(b) grants standing to qualified private individuals to file suit as *qui tam* relators on behalf of the United States. 31 U.S.C. §3730(b); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771-78 (2000). In return for this authority to sue, a putative relator must serve the United States with "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses." 31 U.S.C. §3730(b)(2). Under the plain language of the FCA, then, the relator's disclosure of material evidence and information in his possession showing a fraud is a *quid pro quo* for receiving standing to sue on behalf of the United States. *See United States ex rel. Russell v. Epic Healthcare Mgmt Group*, 193 F.3d 304, 309 (5th Cir. 1999) (under the FCA "the government seeks to purchase information it might not otherwise acquire.").

Because Section 3730(b)(2) requires service of a "copy of the complaint" that will be filed with a federal court, Section 3730(b)(2)'s disclosure requirement must be read in the context of Fed. R. Civ. P. 11(b)(2). That rule requires a plaintiff to certify that "the allegations and other factual contentions [in a complaint] have evidentiary support."[2] If a putative relator possesses no evidence or information to support the fraud allegations in his or her FCA complaint, the relator's ability to file suit is constrained by Fed. R. Civ. P. 11. Nothing in Section 3730(b)(2) reflects any intent by Congress to allow a Relator to obtain standing to sue on behalf of the

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[2] Because the FCA is a fraud statute, the heightened pleading requirements of Fed. R. Civ. P. 9(b) apply to a relator's allegations. *See United States ex rel. Thompson v. Columbia HCA Healthcare Co.*, 125 F.3d 899, 903 (5th Cir. 1997).

United States to pursue a lawsuit that is lacking the evidentiary support required by Rule 11.[3] Of course, if a relator possesses evidence or information to support an FCA claim, the relator must disclose that evidence and information to the United States at or before the time of filing suit. 31 U.S.C. §3730(b)(2).

Several negative consequences occur when a relator files a *qui tam* lawsuit under the FCA without first showing the United States that he possesses evidence and information to support the claim. Because the United States has a duty to investigate the relator's allegations, *see* 31 U.S.C. §3730(a), the United States is forced to waste its limited resources chasing down unsubstantiated accusations with little evidence to guide the United States. This undermines a fundamental purpose of Section 3730(b)(2), which is to give the United States a full and fair opportunity to investigate allegations to determine whether to intervene. *See United States ex rel. Woodard v. Country View Care Center*, 797 F.2d 888, 892 (10th Cir. 1986); JOHN T. BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS §4.04[a] (3d ed. 2006). Even worse, such a *qui tam* complaint filed without evidentiary support might

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[3] Rule 11 was adopted years before Section 3730(b)(2) was added to the FCA. Rule 11 was first adopted in 1938, and required "good grounds" to support the allegations in the complaint. *See* 5A CHARLES ALAN WRIGHT & ARTHUR B. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 3d §1331 at 459 (2004). The predecessor to Section 3730(b)(2) was adopted in 1943. *See* Pub. L. 78-213, 57 Stat. 608 (Dec. 23, 1943). Congress amended the FCA to include the current version of Section 3730(b)(2) in 1986, as part of the same amendments that added Section 3730(e)(4). *See* Pub. L. 99-562, 100 Stat. 3153 at 3154-55, 3157 (Oct. 27, 1986). In 1986, Congress also expressed its clear intent to prohibit frivolous *qui tam* lawsuits. *See* 31 U.S.C. §3730(d)(4) (allowing prevailing defendants to recover attorneys' fees and costs arising out of frivolous or vexatious lawsuits); Pub. L. 99-562, 100 Stat. 3153 at 3153157 (Oct. 27, 1986) (adopting §3730(d)(3)); Pub. L. 100-700, 102 Stat. 4631 at 4638 (Nov. 19, 1988) (moving §3730(d)(3) to §3730(d)(4)).

bar future relators who may actually possess information regarding fraud that would be useful to the United States. *See* 31 U.S.C. §3730(b)(5). *But cf. United States ex rel. Campbell v. Reading Medical Center*, 421 F.3d 817, 821-25 (9th Cir. 2005) (refusing to apply first-to-file bar when original lawsuit was dismissed for lack of jurisdiction).

Section 3730(b)(2) imposes no express limitation on the sources of evidence and information that a relator may rely upon to craft his FCA claim so long as that evidence and information is "material." 31 U.S.C. §3730(b)(2). Section 3730(b)(2) encourages the disclosure of fraud allegations, regardless of the source of the evidence and information to support those allegations.

2. *When the Public Disclosure Bar Is Triggered, the Relator Must Also Show That He Has "Direct and Independent Knowledge" of the Information on Which the Fraud Allegations Are Based.*

In instances when the fraud allegations have been publicly disclosed prior to the filing of the lawsuit, Congress imposed a different set of requirements that a relator must satisfy in order to be able to sue. The relator must qualify as an "original source." Congress defined "original source" to mean "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. §3730(e)(4)(B). In contrast to the general standard that applies to all relators under Section 3730(b)(2), Section 3730(e)(4) expressly addresses the source of the information that a relator must possess to meet the original source test—a relator must have and rely upon information that is within his "direct and independent knowledge." 31 U.S.C. §3730(e)(4)(B).

Congress' decision to impose a "direct and independent knowledge" requirement on top of the general disclosure requirements of Section 3730(b)(2) shows a clear intent to adopt a heightened standard for the type of "information" that a relator must possess to qualify as an original source. Not just any information will do. Many courts have interpreted this statutory language to require a relator to possess "first-hand knowledge" of the information. *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) ("In order to be 'direct,' the information must be first-hand knowledge."); *United States ex rel. Alfatooni v. Kitsap Physician Services*, 163 F.3d 516, 525 (9th Cir. 1998) (relator "must show that he had firsthand knowledge of the alleged fraud . . ."); *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("A relator is said to have direct knowledge of fraud when he saw [it] with his own eyes."); *United States ex rel. Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 160 (3d Cir. 1991) ("the relator must possess substantive information about the particular fraud"). After all, "direct knowledge" is knowledge that is gained from actually seeing the events in question. *See* BLACK'S LAW DICTIONARY 460 (6th ed. 1990) (defining "direct evidence").

Although the federal circuit courts (except the Tenth Circuit in *Stone* and *Kennard*)[4] appear to agree that a relator must possess first-hand knowledge to be an original source, the courts are divided on what "knowledge" is required. *See United States ex rel. Laird v. Lockheed Martin Engineering and Science Services Co.*, 336 F.3d 346, 353-54 (5th Cir. 2003). Some courts require the relator to possess knowledge

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[4] Prior to *Stone*, the Tenth Circuit also recognized that an original source must possess first-hand knowledge to satisfy the requirements of Section 3730(e)(4)(B). *See United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-63 (10th Cir. 1999).

of the allegations of fraud in the *qui tam* complaint. *See, e.g., United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999); *United States ex rel. Mistick v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376, 388-89 (3d Cir. 1999); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 410-11 (9th Cir. 1993). Other courts require the relator to have knowledge of the publicly disclosed allegations. *See Laird*, 336 F.3d at 355; *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1047 (8th Cir. 2002); *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000); *Findley*, 105 F.3d at 690. In many cases, though, this should be a distinction without a difference.

Regardless of the standard used, the disclosure must identify "allegations or transactions" in order to qualify as a public disclosure. 31 U.S.C. §3730(e)(4)(A). Given that the FCA is a statute aimed at fraud against the Government, the "allegations or transactions" that trigger the public disclosure bar are allegations of fraud or wrongdoing, or the elements of the underlying fraudulent transaction. *See United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 740 (3d. Cir. 1997). Accordingly, to be an original source, a relator must possess first-hand knowledge of the facts underlying and supporting the allegations of fraud, wrongdoing, or the underlying fraudulent transaction. This interpretation of the original source requirement preserves the distinction drawn by Congress regarding the types of information that may be used to satisfy the differing requirements of Sections 3730(b)(2) and 3730(e)(4).[5]

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[5] To be an original source under 31 U.S.C. §3730(e)(4), a relator must also have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." This disclosure is different than that required by Section 3730(b)(2) because, *inter alia*, it requires a disclosure to the Government "before"

3. *The Tenth Circuit's Original Source Decisions in Stone and Kennard Conflict with the Plain Language and Structure of the FCA.*

The original source test articulated by the Tenth Circuit in *Stone* and extended in *Kennard* should be rejected because it states that a relator can qualify as an original source without any knowledge of the actual fraud. In *Stone*, the court allowed the relator to qualify as an original source of a claim alleging false statements made by Rockwell International *after* the relator ceased to work for the company. 282 F.3d 802-03. The court found that Stone had sufficient background knowledge about Rockwell's business practices to allow him to speculate or deduce that Rockwell submitted false statements even after he left. *Id.* In *Kennard*, the Tenth Circuit summed up its prior decision in *Stone* by explaining:

> Comstock's first assertion, that Relators did not possess information about the particular fraud, has no basis in Tenth Circuit precedent. Knowledge of the actual fraudulent conduct is not necessary. *See Stone*, 282 F.3d at 803. A relator "need only possess 'direct and independent knowledge of the *information on which the allegations are based*'." *Id.* (quoting 31 U.S.C. §3730(e)(4)(B)) (emphasis in original). A "relator need not . . . have in his possession knowledge of the actual fraudulent conduct itself; knowledge 'underlying and supporting' the fraud allegations is sufficient." *Id.* (quoting *Hafter*, 190 F.3d at 1162). Thus, the fact that Relators did not have knowledge of the actual alleged fraudulent submissions to the Government cannot disqualify them as an original source.

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filing suit whereas Section 3730(b)(2) allows for disclosure at the time suit is filed. *Compare* 31 U.S.C. §3730(e)(4)(B) *with* 31 U.S.C. §3730(b)(2). Courts have recognized this distinction. *See United States v. Bank of Farmington*, 166 F.3d 853, 866 (7th Cir. 1999); *United States ex rel. King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271, 1280-81 (10th Cir. 2001).

Kennard, 363 F.3d at 1044. The Tenth Circuit's decisions in *Stone* and *Kennard* are nothing short of a license to base a claim of fraud upon speculation, conclusions, and deductions, regardless of whether the relator has any direct knowledge of any actual fraud. The Tenth Circuit's language cannot be squared with the plain language of the FCA, which requires a relator to possess first-hand knowledge of the fraud he alleges.

The Tenth Circuit's reasoning in *Stone* and *Kennard* cannot be squared with Congress' stated intent. Congress clearly intended the FCA to reward only those who were close observers or participants in a fraud who decided to break the conspiracy of silence. S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269. In other words, Congress' goal in adopting the FCA's *qui tam* provisions was to provide an incentive for whistle-blowing insiders to disclose fraud against the Government. *See Stinson*, 944 F.2d at 1161 ("The paradigmatic 'original source' is a whistleblowing insider."); *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) ("The paradigm *qui tam* plaintiff is the 'whistleblowing insider.'"). Contrary to Congress's intent, in *Stone*, the Tenth Circuit allowed a relator to qualify as an original source even though he was no longer an insider with access to information regarding the defendant's actual practices. 282 F.3d at 802-03. In *Kennard*, the Tenth Circuit went further, explaining that the question of whether a relator was an insider who would have access to information regarding the actual practices of a defendant was "a concern we deem irrelevant to the current inquiry." 363 F.3d at 1047.

Although it may not be necessary to be classified as an "insider" to qualify as an original source, it is certainly not permissible to allow a party to be an original source based upon speculation, suspicions, or a mere belief that the defendant had an opportunity to commit a fraud. *See Alfatooni*,

163 F.3d at 526. An original source is someone who has actual, first-hand knowledge of wrongdoing.

B. The Tenth Circuit's Original Source Analysis From *Stone* and Its Progeny Leads to an Unworkable Standard for Jurisdiction.

The Tenth Circuit's original source decisions in *Stone* and its progeny reflect a fact-based inquiry that allows some (but not all) relators to qualify as original sources without possessing any knowledge of the actual fraud. The problems with the *Stone* approach are best illustrated by comparing the Tenth Circuit's decisions in *Kennard v. Comstock*, *supra*, and *United States ex rel. Grynberg v. Praxair*, 389 F.3d 1038 (10th Cir. 2004).

In both *Kennard* and *Grynberg*, the Tenth Circuit explained that: "it is the character of the relator's discovery and investigations that controls [the original source] inquiry" when a relator is trying to use public records and other materials to substitute for the lack of actual knowledge of a fraud. *See Kennard*, 363 F.3d at 1044-45; *Grynberg*, 389 F.3d at 1053. To explain the results reached in those cases, however, the Tenth Circuit has crafted new legal standards that have no basis in the text of the FCA. Of course, the Tenth Circuit's point of departure from the text of the FCA is *Stone*.

a. In *Kennard*, the Tenth Circuit allowed two relators to qualify as original sources even though they possessed no inside knowledge of Comstock's operations, and no firsthand knowledge of fraud. The first relator, Relator Wright, claimed to own mineral interests in private East Texas oil and gas leases that were "near" to, but different from, the Indian leases at issue in the *Kennard* case. 363 F.3d at 1040. Relator Wright claimed that his royalty payments decreased when Comstock took over the operations on his property. *Id.* From this single alleged instance of underpayment on his

private leases, Relator Wright "speculated" that Comstock must be underpaying royalties owed to the Tribe from operations on wholly different leases in which Wright owns no interest.[6] *Id.* at 1040-41. Because the Tribe is under the federal trust supervision of the United States Secretary of the Interior, Comstock is required to report and pay the royalties it owes to the Tribe to the MMS. *Id.* at 1040. Accordingly, Relator Wright believed that the alleged underpayments to the Tribe were also the subject of false claims submitted to the United States. *Id.* at 1048. Relator Wright, of course, had no personal knowledge of what royalties were paid to the Tribe, or how those royalties were calculated. Moreover, Relator Wright had no knowledge of what discussions may have been held between Comstock, the Tribe, and the United States about how to report and pay royalties.[7] Nevertheless, the

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[6] Relator Wright has filed FCA claims against more than 40 other companies based upon similar speculative theories of wrongdoing. *See United States ex rel. Wright v. Chevron USA, Inc.*, Case No. 5:03-cv-264, in the United States District Court for the Eastern District of Texas. Employing reasoning similar to that used by the Tenth Circuit in *Stone* and *Kennard*, the district court in the *Wright* case found that Wright qualified as an original source based upon his background knowledge and speculation. The district court allowed Wright to qualify as an original source of claims against companies about whom Wright admitted under oath that he had no direct knowledge regarding their royalty reporting or payment practices.

[7] Knowledge of the contacts between a defendant and the United States is highly relevant to an FCA case. Many courts recognize that the Government's knowledge of particular conduct and its cooperation with a defendant may bar an FCA claim based upon that conduct. *See, e.g., United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002); *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000); *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 (7th Cir. 1999); *United States ex rel. Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991).

Tenth Circuit found that Relator Wright had "direct and independent knowledge" of the fraud he alleged. *Id.* at 1046.

Relator Kennard's claim to original source status was equally suspect. According to the Tenth Circuit, Kennard conducted an investigation of public records to support his conclusions that Comstock underreported and underpaid royalties owed to the Tribe. *Id.* at 1046. Kennard claims to have seen a lease file marked "expired" in the Texas General Land Office, which lead him to conclude that Comstock's leases were invalid. *See* 2002 WL 32714554, *6. He also claims to have reviewed other public records that led him to believe that Comstock underpaid royalties to the Tribe. *Id.* Of course, like Wright, Relator Kennard had no personal knowledge of what royalties were paid to the Tribe, or how those royalties were calculated. Relator Kennard had no knowledge of what discussions may have been held between Comstock, the Tribe, and the United States about how to report and pay royalties. He did not even know the details surrounding the creation of the public records (*i.e.* hearsay) that he reviewed to support his theory. Nevertheless based on its reasoning in *Stone*, the Tenth Circuit found that Relator Kennard had "direct and independent knowledge" of the fraud he alleged. *Id.* at 1046.

When Comstock protested that Relators did not have any knowledge of whether a fraud had been committed, the Tenth Circuit explained: "[t]here must be some consideration to the availability of the information and the amount of labor and deduction required to construct the claim." *Id.* at 1046. Relators had no access to information regarding Comstock's actual practices with respect to its operations on the Tribe's Reservation because Relators were not insiders of either Comstock or the Tribe. In their roles as outsiders, Relators had no first-hand knowledge about any elements of an FCA claim. More specifically they had no direct knowledge of, and could only speculate wildly about: what statements were

or were not made to the Government, whether those statements were or were not true; and if untrue, whether those statements were made with the intent required by the statute. Relators do not qualify as original sources under the plain language of Section 3730(e)(4)(B). Nevertheless, the Tenth Circuit allowed Relators to qualify as original sources because:

> This case would not exist but for Relators sniffing it out. Through discovery and deduction, Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source.

Id.

With this decision, the Tenth Circuit expanded its prior decision in *Stone* to a new level, allowing claims based solely upon speculation and deduction. The Tenth Circuit explained that this new standard to qualify as an original source is an alternative to the first-hand knowledge requirement imposed by earlier Tenth Circuit decisions. *Id.* (distinguishing *Hafter*, 190 F.3d at 1162-63). There is no support for this alternative in the FCA's text.

b. Later, in *United States ex rel. Grynberg v. Praxair*, the Tenth Circuit reached a correct conclusion by finding that a relator with no first-hand knowledge of the fraud was not an original source.[8] According to the Tenth Circuit, Relator Grynberg could not qualify as an original source because his allegations of wrongdoing against Praxair were based on information he learned from another individual and on a government report that disclosed the allegedly fraudulent transaction that formed the basis of his lawsuit. 389 F.3d at

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[8] Relator Grynberg has filed in excess of 70 *qui tam* lawsuits under the FCA in which the original source test is at issue. Those lawsuits were consolidated for pretrial proceedings (along with the *Kennard* case) in MDL-1293, *In re Natural Gas Royalties Qui Tam Litigation*, in the United States District Court for the District of Wyoming.

1054. In the process of rendering that decision, though, the Tenth Circuit highlighted its erroneous legal standards from *Stone* and *Kennard*.

The Tenth Circuit began by explaining that the facts of *Kennard* and *Grynberg* were "somewhat similar." *Id.* at 1053. The court distinguished *Kennard*, however, by finding that "Grynberg was not the individual who 'ferreted out the fraud.'" *Id.* at 1054. The court also distinguished Grynberg from Relator Wright by finding that Wright was able to form "suspicions" of wrongdoing by reviewing his own private royalty statements, whereas Relator Grynberg had no private records of his own to review. *Id.* By discussing prior precedent based on "suspicions" and the results of "ferretting," the *Grynberg* decision highlights just how far the Tenth Circuit's decisions in *Stone* and its progeny have departed from the text of the FCA.

c. There is no basis in the text of the FCA for a "ferreting out the alleged fraud" or "sniffing it out" theory to qualify as an original source.[9] Moreover, the FCA flatly rejects original source status based on speculation and deductions. Under the FCA, a relator must have "knowledge" to be an original source. 31 U.S.C. §3730(e)(4)(B).

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[9] Although one purpose of the FCA's *qui tam* provisions is to "ferret" out fraud against the Government, Congress' goal was "to ferret 'out fraud by encouraging persons with *firsthand knowledge* of alleged wrongdoing to come forward.'" *Alfatooni*, 163 F.3d at 525 (quoting *United States ex rel. Devlin v. State of California*, 84 F.3d 358, 360 (9th Cir. 1996)) (emphasis added). The Ninth Circuit discussed the FCA's purpose in the context of the original source test's first-hand knowledge requirement. The Tenth Circuit, however, used the FCA's goal of ferreting out an alleged fraud as a substitute for the FCA's knowledge requirements.

CONCLUSION

Comstock Resources, Inc. respectfully requests that this Court enter a decision in this case that interprets the FCA's original source provision according to its plain language. In the process, the Court should expressly reject the Tenth Circuit's line of authority reflected in *Stone* and *Kennard* that states that a relator need not possess actual first-hand knowledge of an alleged fraud to be an original source. The Tenth Circuit's reasoning is contrary to the plain language of the statute.

Respectfully submitted,

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